STATE OF MICHIGAN
IN THE SUPREME COURT

NORTH AMERICAN BROKERS, LLC, a Michigan limited liability company, and, MARK RATLIFF, an individual,

Plaintiffs-Appellees,

-vs-

HOWELL PUBLIC SCHOOLS, a Michigan general powers school district,

Defendant-Appellant,

and,

ST. JOHN PROVIDENCE, a Michigan corporation,

Defendant.

Supreme Court No. 155498

Court of Appeals No. 330126

Livingston Circuit Court No. 2015-28669-CH

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PLAINTIFFS-APPELLEES' ANSWER TO APPLICATION FOR LEAVE TO APPEAL

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Did the Trial Court Reversibly Err by Granting Summary Disposition regarding Plaintiff's Action for a Broker Commission?

Plaintiffs-Appellees say "Yes."

Defendant-Appellant says "No."

The Court of Appeals said "Yes."

The trial court said "No."

STATEMENT REGARDING PROCEDURAL POSTURE, ORDER APPEALED FROM, JURISDICTION, RELIEF SOUGHT, AND ORAL ARGUMENT

Procedural Posture

This is an action to recover a broker's commission consequent to the sale of a property. On the complaint, alone, Defendant-Appellant ("Defendant") filed its motion for summary disposition. The trial court granted the motion on the basis that this action is barred by the statute of frauds, MCL 566.132. The Court of Appeals reversed. *North American Brokers, LLC v Howell Public Schools*, unpublished opinion (COA No. 330126, 2/9/2017 ["COA Opinion."). Defendant filed its application for leave to appeal, to which Plaintiff-Appellee[1] ("Plaintiff") responds.

Order Appealed From

Defendant appeals *North American Brokers, LLC v Howell Public Schools*, unpublished opinion (COA No. 330126, 2/9/2017 ("COA Opinion"), reversing the trial court's Order, 10/15/2015 (granting summary disposition and dismissing action).

Jurisdiction

This Court has jurisdiction. MCR 7.303(B)(1).

Relief Sought

Plaintiff requests this Court deny Defendant's application for leave.

[1] For ease of exposition, Plaintiff, singular, encompasses both the individual and the corporate plaintiffs-appellees.

STATEMENT OF FACTS

Underlying Basis for Factual Statement

Defendant brought its motion for summary disposition prior to filing an Answer to the Complaint. Defendant's Statement of Facts (Defendant's Motion [to the trial court], pp. 2-4) seemingly accepted all of Plaintiff's alleged facts as true:

> Howell has filed this motion pursuant to MCR 2.116(C)(8). At this stage, therefore, the Court must accept all of Plaintiffs' alleged facts as true. The facts herein are taken only from those alleged in Plaintiffs' Complaint.[2]

Accordingly, Plaintiff relies upon two sources of factual material: (i) Defendant's motion and brief, insofar as Plaintiff concurs, and (ii) facts stated in the Complaint, none of which are contested by Defendant (having filed no Answer).

And yet, Defendant's recitation of facts to this Court swerves from the facts within the Complaint. At page 2, Defendant states "Plaintiffs were attempting to trick Howell," a "fact" found nowhere within and not fairly inferred from the complaint. Defendant's factual assertions fail to appreciate the criteria that govern this appeal: (i) there was no answer to the complaint, (ii) the motion was predicated only upon the single pleading, and (iii) the "factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Maiden v Rozwood*, 461 Mich. 109, 119, 597 N.W.2d 817 (1999). Defendant's proclamation that "Plaintiffs were attempting to trick Howell" is

[2] However, Defendant then argued purported facts not within the Complaint and not a matter of record.

mere hyperbole, designed to inflame and not intended as a dispassionate statement regarding facts within the complaint.

Under these circumstances, Plaintiff is compelled to briefly review the controlling facts – devoid of passion and prejudice, yet presenting the facts[3] in the light most favorable to Plaintiff. Michigan law is applied to these facts.

Substantive Facts

The summary is ordered for coherency and is not necessarily chronological.

1. Defendant erected a "for sale" sign on the Property with the words "Broker Protected." (Complaint, General Allegations, ¶ 14, Appeal Ex. 1; Appeal Ex. 2)[4] The sign is referred to as the "Latson Sale Sign;" the sale of the Latson Elementary School Property ("Property") gives rise to this litigation.

2. The Latson Sale Sign "explicitly promised Plaintiffs [any real estate broker] that it [Defendant] would honor the earned broker fee for delivering to them [Defendant] a buyer." (Complaint, Count I, ¶ 41, Appeal Ex. 1) Indeed,

> Howell School's promise was clear, definite and unequivocal and was specifically made to induce Plaintiffs to render the contemplated services for the stated period for Howell School's benefit. [Complaint, Count I, ¶ 42, Appeal Ex. 1.]

This deserves emphasis and must be deemed true in the context of Defendant's motion (filed with no answer to complaint): Defendant unequivocally intended to induce a broker to rely upon its promise that Defendant would pay a broker fee.

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[3] Plaintiff is fully aware that the "facts" are allegations. However, in this appeal, allegations (and reasonable inferences therefrom) are deemed true, *i.e.* they are the "facts" on review.

[4] The Complaint attached a picture of the sign, Exhibit A, Latson Sale Sign.

3. Ratliff[5] engaged in conduct by which he determined that the Property might fit the needs of St. John Providence (St. John) and induced St. John to consider the purchase of the Property. (Complaint, General Allegations, ¶¶ 9, 10, 13-22, 25-27, 31, Appeal Ex. 1.) (Mr. Hoban, Senior Vice President of St. John, was the primary person in contact with Ratliff. Complaint, *passim*.)

4. Indeed, St. John evidenced an unmistakable, "pronounced" interest in purchasing the Property. (Complaint, General Allegations, ¶¶ 16-18, Appeal Ex. 1.)

5. Eventually, St. John did not contract with Plaintiffs regarding the Property sale, apparently choosing another developer for the project and not acknowledging that any entity was entitled to a commission. (Complaint, General Allegations, ¶¶ 32, 35, Appeal Ex. 1.)

6. North American Brokers contacted Defendant Howell Public Schools.[6]

7. Mr. Ron Kirk, a member of North American Brokers, contacted Mr. Rick Terres, Associate Superintendent of Howell Schools, and informed Mr. Terres "that [North American Brokers] had a client [a buyer] interested in seeing their properties listed for sale." (Complaint, General Allegations, ¶ 12, Appeal Ex. 1.)

8. Thereafter, Mr. "Kirk contacted Terres and arranged a meeting with Ratliff and Terres at the Latson School Property to walk and review the site prior to Hoban's[7] scheduled visit." (Complaint, General Allegations, ¶ 20, Appeal Ex. 1.) Ratliff, Kirk and

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[5] For the purpose of this appeal, Plaintiff does not distinguish between Ratliff and North American Brokers.
[6] COA Opinion, p. 1.
[7] Mr. Hoban, as noted *supra*, is Senior Vice President of St. John, and the primary person in contact with Ratliff.

Terres met at the Latson School Property. Mr. Terres "gave Kirk and Ratliff a complete tour of the Latson School Property and educated Kirk and Ratliff about the Latson School Property for the purpose of a potential sale to the buyer Kirk and Ratliff were presenting (sic, representing)." (Complaint, General Allegations, ¶ 23, Appeal Ex. 1.) During the visit Ratliff and Kirk told Mr. Terres of the client interested in the property. The group discussed the sale price and the cost of demolishing the existing structure. Mr. Terres asked for a written offer. (Complaint, General Allegations, ¶ 24, Appeal Ex. 1.)

9. Thereafter, there were various communiques by email between Defendant and Plaintiff. Plaintiff proposed both a letter of intent and a Confidentiality, Commission & Broker Protection Agreement ("NAB Agreement"). None was signed by Defendant. (Complaint, General Allegations, ¶¶ 27-28, 30, 33-34, Appeal Ex. 1.)

10. But subsequently, Defendant sold the Property to St. John Providence using another entity to "finalize the deal" and "fashion a purchase agreement." (Complaint, General Allegations, ¶ 35, Appeal Ex. 1.) Defendant and the buyer entered into the purchase agreement on July 7, 2014. (Complaint, General Allegations, ¶ 37, Appeal Ex. 1.)

11. Plaintiff's efforts directly caused the sale by Defendant to the buyer and entitled Defendant to a broker's commission. Defendant is liable to Plaintiff under the theories of: Promissory Estoppel (Count I), Quantum Meruit/Unjust Enrichment (Count II), Negligent Misrepresentations (Count IV [sic]), Procuring Cause (Count V), and Breach of Contract (Count VI). (Appeal Ex. 1.)

Trial court proceedings

Defendant moved for summary disposition.[8] It contended this action is barred by the statute of frauds, MCL 566.132, and by governmental immunity. The trial court granted Defendant's motion. (The co-defendant was dismissed by stipulation. [Case Register of Actions, 10/23/2015].)

Court of Appeals proceedings

Plaintiff filed a claim of appeal from the trial court decision. The Court of Appeals reversed the trial court based on *Opdyke Invest Co. v Norris Grain Co.*, 413 Mich. 354, 364, 320, N.W.2d 836 (1982), but expressed disapproval of this Court's opinion. (COA Opinion, pp. 3-4.)

[8] Defendant Howell Public Schools' Motion for Summary Disposition Pursuant to MCR 2.116(C)(7) and (8) (sic, actually Brief in Support of Motion), 9/17/2015, p. 1, (hereafter Defendant Brief).

LAW AND ARGUMENT

Defendant Erected a Sign Saying "Broker Protected" – a Term of Art Promising that the Vendor Would Pay a Broker's Commission. Plaintiff Was the "Procuring Cause" (or Moving Force) of the Sale from Defendant-Vendor to the Purchaser. Nevertheless, Defendant Paid No Commission.

The Trial Court Reversibly Erred by Granting Summary Disposition regarding Plaintiff's Action for a Broker Commission. (The Court of Appeals Properly Reversed.)

Standard of review

Pertinent to the issues raised by this appeal, Defendant filed its motion for summary disposition predicated on MCR 2.116(C)(7). The rule provides:

> (C) Grounds. The motion may be based on one or more of these grounds, and must specify the grounds on which it is based:
>
> * * *
>
> (7) Entry of judgment, dismissal of the action, or other relief is appropriate because of * * * statute of frauds * * *.

Defendant filed its motion for summary disposition without filing an Answer to the Complaint. Clearly, there was no discovery.

In general, in a motion predicated upon MCR 2.116(C)(7), the court may consider affidavits, deposition, admissions, and documentary evidence. MCR 2.116(G)(2); MCR 2.116(G)(6). However, the motion at hand was brought prior to filing an answer to the complaint and in the utter absence of discovery.

Here, as there were no affidavits or other documentary evidence, Defendant's presentation of purported facts (outside of the complaint) must be ignored. The only

"facts" that may be presumed true are those set forth in the complaint. *Maiden v Rozwood*, 461 Mich. 109, 119, 597 N.W.2d 817 (1999). Moreover, the complaint must be read in the light most favorable to the plaintiff. *Maiden, id.*, opined:

> A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. [Citation and internal quotation marks omitted.]

Accord *Dalley v. Dykema Gossett*, 287 Mich.App. 296, 304-305, 788 N.W.2d 679 (2010). On motions for summary disposition, the court shall give "the benefit of doubt to the nonmovant**."** *Lytle v. Malady,* 209 Mich.App. 179, 183, 530 N.W.2d 135 (1995); *Weisman v. U.S. Blades, Inc.*, 217 Mich.App. 565, 567, 552 N.W2d 484 (1996).

Substantive Law and Argument

Summary of Argument

Defendant erected a "for sale" sign stating that brokers would be protected – an explicit promise that Defendant would pay a broker's commission. In reliance upon this promise, Plaintiff engaged a buyer to purchase the Property; Plaintiff was the "procuring cause" of the sale – the moving force. Defendant fully knew of Plaintiff's efforts. Eventually, Defendant closed the sale and paid no commission.

In the trial court, Defendant raised the statute of frauds, and the trial court agreed. The trial court erred. On the circumstances presented by this cause of action, Defendant is estopped from raising the statute of frauds. This conclusion may be articulated as (i) a

count for promissory estoppel or (ii) as a count for breach of contract with Defendant equitably estopped from raising the statute of frauds.

Plaintiff's brief embraces these arguments: (i) the transaction is best characterized as an offer of a unilateral contract that was accepted; (ii) the "procuring cause" doctrine demonstrates that Plaintiff accepted and substantially performed the unilateral contract; (iii) defendant is equitably estopped from raising the statute of frauds (plaintiff may permissible state a claim for promissory estoppel); and (iv) a survey of a decisional authority in different contexts demonstrates an equitable theory of recovery is permissible, notwithstanding that a contract action standing alone is barred by the statute of frauds.

The Transaction was a Unilateral Contract.

Defendant erected a "for sale" sign on the Property with the words "Broker Protected." (Defendant's Brief, p. 5; Complaint, General Allegations, ¶ 14, Appeal Ex. 1; Appeal Ex. 2)[9] Put another way, there was a unilateral contract – Defendant offered to pay a broker commission for brokerage services. Trentacosta, Michigan Contract Law (2nd ed.), §2.3, concisely explains:

> In unilateral contracts one party makes a promise without receiving any express promise of performance in return. *In re Certified Question*, 432 Mich 438, 446, 443 NW2d 112 (1989) (citing Restatement (First) of Contracts §12); *accord Sniecinski v Blue Cross & Blue Shield*, 469 Mich 124, 666 NW2d 186 (2003). * * * Because no return promise is requested, the offeree is not bound to perform and no legally enforceable contract exists. But a unilateral contract will be legally enforceable once the offeree has substantially performed. *Ensign Painting Co v Alfred A Smith, Inc*, 21 Mich App 494, 502, 175 NW2d 789 (1970), *rev'd on other*

[9] The Complaint attached a picture of the sign, Exhibit A, Latson Sale Sign. Appeal Ex. 2.

> *grounds*, 385 Mich 268, 188 NW2d 534 (1971) (plaintiff accepted contract by undertaking substantial performance under unilateral written order). * * *

Plaintiff "substantially performed." Substantial performance is accomplished when a broker is the "procuring cause" of the sale. The procuring cause doctrine is discussed *infra*.

Since there was an offer of a unilateral contract and substantial performance, Plaintiff is entitled to payment for its services. Failing to make payment breaches a contract, and Defendant is estopped from raising the statute of frauds for reasons that follow.

The Procuring Cause Doctrine

Under Michigan law, a real estate agent seeking to recover a commission stemming from the sale of real property must demonstrate he/she was the procuring cause of the sale. *Reed v. Kurdziel*, 352 Mich. 287, 294, 89 NW2d 479 (1958). The claimant must show he produced a buyer that was ready, willing, and able to perform the sale. *Ladd v. Bolema*, 246 Mich. 32, 224 N.W. 330 (1929).

In *Reed*, 352 Mich. at 294, this Court reviewed and summarized Michigan decisions.

> [T]he law with reference to commissions allowed agents or brokers seems to indicate that it is difficult to determine a set line of decisions * * *. However, when they are viewed as a whole and brought into proper focus, they disclose the law applicable to the question is well settled and that the seeming confusion results from the application of that law to the particular facts of the specific cases in question. Vol. 12 A.L.R.2d 1363 states as follows:
>
> > The relationship between agent or broker and principal being a contractual one, it is immediately apparent that whether an agent or broker employed to sell personalty on commission is entitled to commissions on sales made or consummated by his principal or by another agent depends upon the intention of the parties and the interpretation of the contract of employment, and that, as in other cases involving interpretation, all the circumstances must

> be considered. * * * This rule is recognized and stated in the American Law Institute, Restatement, Agency § 449 Comment a.'
>
> [U]nderlying all the decisions is the basic principle of fair dealing, preventing a principal from unfairly taking the benefit of the agents or broker's services without compensation and imposing upon the principal, regardless of the type of agency or contract, liability to the agent or broker for commissions for sales upon which the agent or broker was the procuring cause, notwithstanding the sales made have been consummated by the principal himself or some other agent. In Michigan, as well as in most jurisdictions, the agent is entitled to recover his commission whether or not be has personally concluded and completed the sale, it being sufficient if his efforts were the procuring cause of the sale. In Michigan the rule goes further to provide if the authority of the agent has been cancelled by the principal, the agent would nevertheless be permitted to recover the commission if the agent was the procuring cause. [*Id.*, 352 Mich. at 294-296; citations omitted.]

Reed is entirely clear. The critical issue is whether the agent is the procuring cause of the sale. Even if the agent's authority is cancelled, she/he may recover the commission.

In *Reade v Haak*, 147 Mich. 42, 110 N.W. 130 (1907), the plaintiff sued to recover a commission fee upon the sale of real estate and personal property. This Court affirmed the verdict for the broker, although the plaintiff did not bring the seller an offer from North & Strong (buyer) that was accepted by the defendant. "It was not necessary, however, that the plaintiffs should conclude the sale in person; it was sufficient if their efforts were the procuring cause of the sale." *Id.* at 46 (emphasis added).

In *Case v. Rudolph Wurlitzer Co.*, 186 Mich. 81, 152 N.W. 977 (1915), the plaintiff asserted a claim for a commission on the sale of band organs. The plaintiff asserted alternative theories to recover commissions: (i) an express contract, and (ii) "if it was found that plaintiff's assignor was the procuring cause of the sale, the plaintiff would be entitled to recover the usual and customary rate of commission." *Id.* at 84. The jury disregarded the first theory and returned a verdict based upon the "procuring cause" theory. *Id.* This Court affirmed. *Id.* at 88. This Court held, *id.* at 85:

> We think that there was enough evidence in the case to submit the question to the jury as to whether or not Case was the procuring cause of the sale and the defendant knowingly accepted and availed itself of his services, and it is well settled that under such circumstances the law will imply a promise to pay a fair and reasonable compensation therefor.

There is no doubt that the procuring cause doctrine gives rise to a proper cause of action.

In *MacMillan v C. & G. Cooper Co.*, 249 Mich. 594, 229 N.W. 593 (1930), the plaintiff claimed a commission regarding a sale of factory engines. This Court held the plaintiff was entitled to the commission. Noting the procuring cause, this Court opined:

> The proofs justified the finding of the court that he [the plaintiff] was the procuring cause of the sale made, and, if so, he was entitled to the percentage of the selling price agreed upon. It was not necessary, to support his recovery, that he should conclude the sale in person. His authority had not been revoked, **but, even if it had, the defendant could not thereby avoid payment**. [*Id.* at 598; emphasis added.]

In *Heaton v Edwards*, 90 Mich. 500, 503-504, 51 N.W. 544 (1892), the plaintiff sued to recover a commission on the sale of real estate. This Court excoriated the proposition that a property owner may personally sell the property and deprive the broker of a commission to which he was rightfully entitled.

> If vendors were permitted to employ brokers to look up purchasers, and call the attention of buyers to the property which they desired to sell, limiting them as to terms of sale, and then, while such purchasers were negotiating, take the matter into their own hands, avail themselves of the services and expenses of the broker in bringing the property into market, and effect a sale by an abatement in the price, and yet refuse to pay the broker anything, the business of a broker would not be worth pursuing; gross injustice would be done; every unfair and illiberal vendor would limit his property at a price slightly above the market, and make use of the broker to bring it into notice, and then make his own terms with the buyers, who were in reality procured by the efforts of the agent. [*Id.*, 503-504, citation and internal quotation marks omitted.]

The admonition in *Heaton* directly applies to this cause of action. Defendant took advantage of Plaintiff's efforts. Plaintiff had directed the buyer's attention to the property that Defendant wished to sell. And Defendant then sold the property, refusing to pay the broker, Plaintiff herein. This Court's reproach that this conduct would make the business of a broker not worth pursuing – constituting a gross injustice – applies here.

Moreover, the doctrine is well established in real estate arbitration. *Appendix II to Part Ten, Arbitration Guidelines* (Appeal Ex. 3), p. 148, speaks to procuring cause. It recites *Black's Law Dictionary, Fifth Edition:*

> The proximate cause; the cause originating a series of events which, without break in their continuity, result in the accomplishment of the prime object. The inducing cause; the direct or proximate cause. Substantially synonymous with "efficient cause."
>
> A broker will be regarded as the "procuring cause" of a sale, so as to be entitled to a commission, if his efforts are the foundation on which the negotiations resulting in a sale are begun. A cause originating in a series of events, which, without break in their continuity, result in the accomplishment of prime objective of the employment of the broker, who is producing a purchaser ready, willing, and able to buy real estate on the owner's terms. *Moamed v. Robbins,* 23 Ariz.App. 195, 531 P.2d 928, 930).

Critically, the procuring cause is that which "caused" the successful transaction to come about. The Arbitration Manual refers to factors for that panels shall consider in determining procuring cause and includes an arbitration worksheet. It provides, **"**Procuring cause shall be the primary determining factor in entitlement to compensation. Agency relationships, in and of themselves, do not determine entitlement to compensation." *Id.* at p. 149 (Appeal Ex. 3). Other key factors include the agent's communication and contact – Abandonment and Estrangement: "Panels will want to consider * * * whether such conduct or lack thereof, caused a break in the series of events leading to the transaction and whether the successful transaction was actually

brought about through the initiation of a separate, subsequent series of events by the second cooperating broker." *Id.* at p. 150 (Appeal Ex. 3).

Michigan law is comprehensive and unequivocal. Under the procuring cause doctrine, Plaintiff brought a valid cause of action against Defendant. The trial court may have perceived the validity of the cause of action, but it was distracted by the statute of frauds, to which Plaintiff now turns.

The Statute of Frauds

Defendant asserted: (i) Plaintiff's Complaint did not evidence a writing, and (ii) the putative omission barred the cause of action. Defendant argued that Plaintiff's counts are barred by MCL 566.132(2), the statute of frauds. It provides:

> Sec. 2. (1) In the following cases an agreement, contract, or promise is void unless that agreement, contract, or promise, or a note or memorandum of the agreement, contract, or promise is in writing and signed with an authorized signature by the party to be charged with the agreement, contract, or promise:
>
> (a) An agreement that, by its terms, is not to be performed within 1 year from the making of the agreement.
>
> (b) A special promise to answer for the debt, default, or misdoings of another person.
>
> (c) An agreement, promise, or undertaking made upon consideration of marriage, except mutual promises to marry.
>
> (d) A special promise made by a personal representative to answer damages out of his or her own estate.
>
> (e) An agreement, promise, or contract to pay a commission for or upon the sale of an interest in real estate.
>
> (f) An assignment of things in action, whether intended as a transfer for sale, for security, or otherwise.
>
> (g) An agreement, promise, contract, or warranty of cure relating to medical care or treatment. This subdivision does not affect the right to sue for malpractice or negligence.

> (2) An action shall not be brought against a financial institution to enforce any of the following promises or commitments of the financial institution unless the promise or commitment is in writing and signed with an authorized signature by the financial institution:
>
> (a) A promise or commitment to lend money, grant or extend credit, or make any other financial accommodation.
>
> (b) A promise or commitment to renew, extend, modify, or permit a delay in repayment or performance of a loan, extension of credit, or other financial accommodation.
>
> (c) A promise or commitment to waive a provision of a loan, extension of credit, or other financial accommodation.
>
> (3) As used in subsection (2), "financial institution" means a state or national chartered bank, * * *.

Section 2(1) applies to seven distinct categories; section 2(2) applies to three categories (regarding financial institutions). Below, Plaintiff will review decisional authority pertaining to section 2(1). First, some history of the statute is warranted.

Soon after Michigan achieved statehood (January 26, 1837), the Legislature enacted the Statute of Frauds. (Appeal. Ex. 4.) Title XIX, Chapter 81 (approved May 18, 1846) provided:

> Sec. 3. In the following cases specified in this section, every agreement, contract and promise shall be void, unless such agreement, contract or promise, or some note or memorandum thereof be in writing, and signed by the party to be charged therewith, or by some person by him thereunto lawfully authorized, that is to say:
>
> 1. Every agreement that, by its terms is not be performed in one year from the marking thereof;
>
> 2. Every special promise to answer for the debt, default, or misdoings of another person;
>
> 3. Every agreement, promise or undertaking, made upon consideration of marriage, except mutual promises to marry;
>
> 4. Every special promise made by an executor or administrator, to answer damages out of his own estate.

The Legislature, second, enacted Public Acts, 1913, No. 238 (Appeal Ex. 5):

> In the following cases specified in this section [unchanged]:

1. – 4. (unchanged)

5. Every agreement, promise or contract to pay any commission for or upon the sale of any interest in real estate.

Third, the Legislature enacted Public Acts 1945, No. 261. (Appeal Ex. 6.) The act stated:

In the following cases specified in this section [unchanged]:

1. – 5. (unchanged)

6. Every assignment of things in action, whether intended as a transfer for sale, for security or otherwise.

In its fourth incarnation, the Statute of Frauds, Public Acts 1974, No. 343, read (Appeal Ex. 7):

Sec. 3. In the following cases ~~specified in this section~~, an ~~every~~ agreement, contract [thereafter, same]:

(a) – (f) correspond to the prior statute's (1) - (5) except each section begins with "An" or "A" rather than "Every."

(g) An agreement, promise, contract, or warranty of cure relating to medical care or treatment. Nothing in this paragraph shall affect the right to sue for malpractice or negligence.

Finally, fifth, the Legislature enacted Public Acts 1992, no. 245, in 1992, effective January 1, 1993. The language of MCL 566.132(1) is unchanged; MCL 566.132(2) and (3) are added (pertaining to financial institutions).

The Legislature has, since 1846, employed the same language in the statute of frauds. During this period, Michigan courts repeatedly permitted actions based on differing equitable theories. Reflecting this history, the court below reversed the trial court decision, relying upon *Opdyke Investment Co. v. Norris Grain Co.*, 413 Mich. 354, 320 N.W.2d 836 (1993). In turn, *Opdyke Investment* stated a legal percept known to the Legislature for more than a century: the statute of frauds is not absolute; it is subject – has consistently been subject – to exceptions founded on principles of equity.

Under the circumstances at hand, the statute of frauds does not preclude this cause of action. There was a writing. Defendant displayed a "for sale" sign promising Defendant would pay a rightfully-earned broker's commission.

To whatever degree, the promise embodied in the "brokers protected" sign is technically not compliant with the statute of frauds, it is of no import. Plaintiff brings a proper cause of action, because Plaintiff states a proper cause of action for promissory estoppel. (Alternatively, Defendant is estopped from raising the statute of frauds to oppose the count for breach of contract.) And Defendant's assertion that the sign is ambiguous must be unheeded. First, Defendant had filed no answer to the complaint;

there had been no discovery; and the record had not yet been developed. With due regard to the requirement that summary disposition should be denied unless it is impossible that factual development will demonstrate no cause of action, Defendant's motion was unequivocally premature. Second, the sign manifestly invites a broker to mediate a deal and be paid a commission – what else could it mean?

In *The Anderson Associates, Inc. v Kallabat*, unpublished per curiam opinion (Mi.Ct.App. No. 191375, 2/7/1997) (Appeal Ex. 4), the court reviewed the trial court's decision not to enforce "an oral contract for the commission on the sale of real estate" brought as a claim for promissory estoppel. The court first outlined the elements of the claim.

> The elements of promissory estoppel are (1) a promise; (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee; (3) which in fact produced reliance or forbearance of that nature; and (4) in circumstances such that the promise must be enforced if injustice is to be avoided. [Sl op, 2, citing *Marrero v McDonnell Douglas Capital Corp*, 200 Mich.App 438, 442; 505 NW2d 275 (1993).]

The statute of frauds did not bar the claim.

> The Supreme Court has held that the statute of frauds does not bar a validly pleaded claim for promissory estoppel. See *Opdyke, supra* at 369-370. Likewise, this Court has found that claims for promissory estoppel could survive where the original agreement was barred under other subsections of M.C.L. § 533.132; MSA 26.922. We therefore conclude that a claim for promissory estoppel should be allowed where the original agreement was barred by M.C.L. § 566.132(1)(e); MSA 26 .922(1)(e), and we find that the trial court erred in granting defendants' motion for summary disposition of this claim. [*Id.*, citation omitted.]

Anderson Associates cited this Court's decision, *Opdyke Invest Co. v Norris Grain Co.*, 413 Mich. 354, 364, 320, N.W.2d 836 (1982). The plaintiff "sued defendants for breach of

an alleged contract to jointly develop a new sports arena for use by the defendant Detroit Hockey Club, Inc." *Id.* at 357-358. The paramount issue was whether there was a sufficient writing to establish a contract and to satisfy the statute of frauds. After a full discussion of the primary issues, this Court held the plaintiff also stated an action based on promissory estoppel.

> Finally, to the extent that plaintiff's complaint states a cause of action based on "promissory estoppel", accelerated judgment was inappropriate. This Court acknowledged this theory of recovery in *The Vogue v. Shopping Centers, Inc. (After Remand)*, 402 Mich. 546, 266 N.W.2d 148 (1978), without adopting any particular version of promissory estoppel. See, *e.g.*, 1 Restatement Contracts 2d, § 90, p. 242; 1A Corbin, Contracts, §§ 204–205, pp. 232–250; *In re Timko Estate*, 51 Mich.App. 662, 215 N.W.2d 750 (1974). In this case, disputed questions of fact exist as to whether a noncontractual promise was made by the defendants and reasonably relied upon by the plaintiff. Since the statute of frauds only applies to certain "contracts", recovery based on a noncontractual promise falls outside the scope of the statute of frauds. The plaintiff's alternate theory of promissory estoppel is sufficiently pleaded and supported to survive the defendants' motion for accelerated judgment based on the statute of frauds. [*Id.*, 369-370.]

Accord *Kelly-Stehney & Associates, Inc. v. MacDonald's Indus. Products, Inc.*, 254 Mich.App. 608, 658 N.W.2d 494 (2003), ("Looking at the totality of the factual circumstances, we conclude that under the current state of the law, there is no question that the equitable estoppel doctrine applies to this case and that the statute of frauds does not bar enforcement of the oral DLO agreement." *Id.* at 624-625.) This Court vacated the lower court decision.[10] Nevertheless, the Court of Appeals held a promissory estoppel claim properly survives the statute of frauds defense, consistent with other decisions.

[10] This Court vacated the lower court decision and remanded to the Court of Appeals for consideration of the sufficiency of the writing (to satisfy the statute of frauds). *Kelly-Stehney & Associates, Inc. v. MacDonald's Indus. Products, Inc.*, 469 Mich. 1046, 677 N.W.2d 838 (2003).

Anderson Associates also relied upon *Conel Development, Inc v. River Rouge Savings Bank,* 84 Mich.App 415, 422-424, 269 NW2d 621 (1978). The plaintiff asserted a claim for breach of contract that purportedly came within the statute of frauds (an agreement to answer for the debt of another). The court held that the statute of frauds did not bar an action for promissory estoppel. *Id.* at 422.

> To overcome the Statute of Frauds defense, plaintiff relies on an estoppel theory. Estoppel arises where a party, by representations, admissions or silence, intentionally or negligently induces another party to believe facts, and the other party justifiably relies and acts on this belief, and will be prejudiced if the first party is permitted to deny the existence of the facts. Where a plaintiff alleges estoppel to circumvent the Statute of Frauds, a question of fact is raised which must be resolved at trial by the trier of fact. The question on review becomes: Was there sufficient evidence, which, if believed by the trier of fact, would support a finding of estoppel sufficient to circumvent the Statute of Frauds? [*Id.* at 422-423, footnotes omitted.]

The court determined there were sufficient facts to support a finding of estoppel. *Id.* at 424. In this cause of action, there has yet to be a trial; indeed, there has been no discovery. Accordingly, Defendant's argument for dismissal should have been be denied, and the lower appellate court properly reversed.

Anderson Associates also relied upon *Lovely v Dierkes*, 132 Mich.App. 485, 347 N.W.2d 752 (1984). The court, reviewing an employment contract, explained the statute of frauds (MCL 566.132) may preclude enforcement, but "[u]nder certain circumstances, where it would be inequitable to apply the statute of frauds, a party may be estopped from pleading the statute of frauds as a defense." *Id.* at 489. On the facts presented, the plaintiff had "sufficiently alleged all of the elements of promissory estoppel," and the court reversed the trial court's ruling. *Id.* at 489. In this cause of action, Plaintiff has also

sufficiently alleged that Defendant is estopped from raising the statute of frauds as a defense.[11]

Accordingly, Defendant is estopped from raising the statute of frauds as a defense to the breach of contract claim. (Alternatively stated, Plaintiff has properly stated a claim for promissory estoppel – there is no meaningful distinction.)

Defendant brought its motion prior to filing an answer to the complaint; the following should be recalled.

First, Defendant deliberately erected a sign assuring any broker that the commission will be honored. Second, Defendant did this knowing and intending there would be reasonable reliance. A broker would expect to be paid a commission and would work to bring a buyer to Defendant's attention. Third, Plaintiff engaged in extensive efforts to awaken St. John Providence to the opportunity to purchase the property. Plaintiff succeeded in its endeavor. Fourth, Defendant knew that Plaintiff was engaged in these efforts to broker the sale of the Property (and surely Defendant did not advise Plaintiff to expect no compensation for Plaintiff's efforts.) Fifth, Defendant sold the Property to St. John Providence. Sixth, proofs at trial will demonstrate that when Defendant learned of the identity of St. John (the buyer), it fully knew that St. John was the precise purchaser to whom Plaintiff had promoted the sale of the Property.[12] (Plaintiff

[11] As noted *supra*, all well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant; the motion may be granted only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Maiden, supra*, 119-120.

[12] Please see preceding footnote.

has not exhaustively enumerated facts that may emerge in discovery and trial.) Manifestly, Defendant took advantage of Plaintiff to Plaintiff's economic detriment.

In a strikingly similar case, the New Jersey Supreme Court held there is a cause of action. *National Newark & Essex Bank v Housing Authority of the City of Newark*, 75 N.J. 497, 384 A.2d 138 (1978). There, the "[p]laintiffs real estate brokers sued to recover commissions allegedly due on the sale of lands by [the] defendant." *Id.* at 499. The trial court dismissed the suit for a broker's commission based on New Jersey's statute of frauds, N.J.S.A. 25:1-9. *Id.* The New Jersey high court held the plaintiff's proof substantially satisfied the statute.

The statute demanded, *inter alia*, as a condition to recover a commission, there be a writing or memorandum signed by the realty owner. *Id.* at 501. However, the plaintiff learned of the property's availability "though brochures and advertisements of NIDC promoting the development." *Id.* at 502. "This material invited real estate broker participation and much of it carried the legend 'brokers protected.'" *Id.* Thereafter, the plaintiff was encouraged to believe that it would be protected.

> [A]s part of the promotional efforts for the project * * * [the defendant's representative]* * * told them that the Housing Authority could and would pay commissions to brokers if they produced buyers." *Id.*, 504. This confirmation of the "brokers protected" advertisements by the Housing Authority's promotional agent is significant. [*Id.* at 504-505.]

Similarly, in this case on appeal, Defendant erected a sign assuring brokers they were protected. (As noted, Plaintiff is entitled to every favorable inference, to wit, "brokers protected" means that broker commissions will be paid.) Later, knowing that Plaintiff was procuring a sale to a specific buyer, Defendant, cunningly, did nothing to

advise Plaintiff that brokers were unprotected – that a broker would receive no commission regardless of whether the broker was the procuring cause and regardless of efforts by the broker that ensured the eventual sale.

The New Jersey high court wrote, "The offer invited acceptance by performance." *Id.* at 505. The statute did not preclude the claim for a commission. Rather, "The policy of the Statute of Frauds against claims for real estate brokers' commissions based on oral agreements is not offended by our decision herein, which is founded upon undenied written manifestations of authority vested in the broker." *Id.*

In *National Newark*, the defendant conceded that the plaintiff was the moving force in the eventual purchase. Here, where Defendant has filed no answer to the Compliant, Plaintiff is entitled to the presumption that factual development will reveal similar facts. The Complaint is unmistakable; Plaintiff worked extensively with both the vendor and vendee to promote the very sale consummated. Defendant's motion for summary disposition improperly cut off all inquiry into the facts, notwithstanding that factual development would have revealed a meritorious cause of action. The trial court reversibly erred, and the lower appellate court properly reversed.

Decisional Authority on the Statute of Frauds in Various Contexts

Earlier, Plaintiff noted the structure of the governing statute. MCL 566.132 comprises subsections (1) and (2). Subsection (2) governs agreements involving financial institutions; subsection (1) governs agreements arising under disparate circumstances: (i) agreements not to be performed within 1 year, (2) promises to answer for another, (3) promises to predicated on marriage, (4) a promise made by a personal representative to

answer for an estate, (5) **a commission arising from a sale of real estate**, (6) an assignment of an action and (7) an promise of cure relating to medical care.

Notably, subsection 2(1) applies to seven distinct categories; section 2(2) applies to financial institutions. Under an array of circumstances and over the course of long years, Michigan law (focusing on subsection 2[1]) allows equitable claims.

Many decisions address an agreement not to be performed within one year.

In *Industrial Maxifreight Services, LLC v. Tenneco Automotive Operating Co., Inc.*, 182 F.Supp.2d 630 (U.S.D.C. W.D. 2002), the court held the plaintiff properly pled a claim for promissory estoppel, although a contract claim was barred by the statute of frauds bar (agreement not to be performed within one year). *Industrial Maxifreight* relied upon *Lovely v. Dierkes,* 132 Mich.App. 485, 489, 347 N.W.2d 752 (1984). *Lovely* "involv[ed] an oral promise for three years employment." "[T]he Michigan Court of Appeals held that 'where it would be inequitable to apply the statute of frauds,' the common law claim of promissory estoppel can bar application of the statute of frauds." 182 F.Supp.2d at 633. *Industrial Maxifreight* cautioned that equitable claims must not sweepingly override the statute of frauds. But in the case now before this Court, where the facts have yet to be established, there is a firm basis for denying summary disposition of the equitable claim. The facts are not fully developed – could not be less developed. Dismissal before Defendant has filed its answer and before any discovery is unwarranted.

White v Production Credit Assn. of Alma, 76 Mich.App. 191, 256 N.W.2d 436 (1977), involved complex facts. Briefly, a cattle farmer borrower relied upon the lender's oral promise of financing. Because the lender, *inter alia*, conditioned the loan upon the farmer

installing an irrigation system and granting the lender a security interest in the farmer's collateral, the farmer did so. The lender then defaulted on its promise, causing the farmer to suffer damages over two years (for lack of irrigation), until the farmer secured alternative (FHA) financing. *Id.* at 192-194. At trial, "the defendant moved for summary judgment on the basis that the alleged oral contract was within the statute of frauds because it could not have been completed within one year. M.C.L.A. § 566.132(1); M.S.A. § 26.922(1)." *Id.* at 194. The Court of Appeals affirmed the trial court judgment; it held:

> Plaintiff's attorney argued that the statute did not apply because the defendant was estopped to assert the statute as the plaintiff had relied on the oral contract to his detriment.
>
> The doctrine of equitable estoppel is set forth in 3 Williston, Contracts (3d ed.), § 533A, p. 796:
>
> > "Where one has acted to his detriment solely in reliance on an oral agreement, an estoppel may be raised to defeat the defense of the Statute of Frauds."
>
> In *Oxley v. Ralston Purina Co.*, 349 F.2d 328, 336 (C.A. 6, 1965), a factually similar case, the Court quoted the aforementioned doctrine from Williston and then stated:
>
> > "We agree with the rule as above stated and believed that the Michigan Supreme Court would have applied the foregoing language had the problem in this case been before it."
>
> The doctrine was again applied in *Pursell v. Wolverine-Pentronix, Inc.*, 44 Mich.App. 416, 205 N.W.2d 504 (1973).
>
> In the instant case the plaintiff relied upon the defendant's promise, installed an irrigation system and granted defendant a security interest in all of his collateral, to his detriment. It was proper for the trial judge to apply the doctrine. [*Id.* at 194-195.]

Promissory estoppel is a permissible theory of recovery, although an action for breach of contract would otherwise be foreclosed by the statute of frauds.

In *Marrero v. McDonnell Douglas Capital Corp.*, 200 Mich.App. 438, 505 N.W.2d (1993), the statute of frauds barred the contract claim, because the contract could not be

performed within one year. The motion was brought under MCR 2.116(C)(10) upon a developed record, and the court granted the motion. The court held, on the facts before it, there was no proper claim for promissory estoppel. However, the court acknowledged the possibility of the claim under appropriate circumstances. *Id.* at 442-443. Thus, *Marrero* is authority favoring denial of summary disposition. *Marrero* would not preclude the promissory estoppel claim on the procedural posture presented by this appeal – where the plaintiff had no opportunity to develop the facts for review by the court.

In *McMath v. Ford Motor Co.*, 77 Mich.App. 721, 259 N.W.2d 140 (1977), the court also acknowledged that promissory estoppel is a proper cause of action, where an action for breach of contract was precluded by the statute of frauds (contract not to be performed within one year). *Id.* at 725-726. On the specific facts, the court held that the promissory estoppel theory was ill-founded, but there was no doubt: under the right circumstances, promissory estoppel states a proper claim notwithstanding that a contract action is barred by the statute of frauds.

In *Lovely v. Dierkes*, 132 Mich.App. 485, 347 N.W.2d 752 (1982), a breach of contact action regarding an oral employment contract was barred by the statute of frauds (contract not to be performed within one year). But the court held:

> Under certain circumstances, where it would be inequitable to apply the statute of frauds, a party may be estopped from pleading the statute of frauds as a defense. Promissory estoppel arises where * * *.
>
> [P]laintiff has sufficiently alleged all of the elements of promissory estoppel. If the evidence at trial supports plaintiff's allegations, the reliance by plaintiff on defendants' promise would be sufficient to estop defendants from raising the statute of frauds as a defense to plaintiff's action.

The court reversed the trial court's order of summary disposition. Here, the trial court gave no consideration to Plaintiff's promissory estoppel claim, instead holding that no such claim can succeed because of the statute of frauds. The Court of Appeals properly reversed.

Accord: *Pursell v. Wolverine-Pentronix, Inc.*, 44 Mich.App. 416, 418, 506, 205 N.W.2d 504 (1973) (Although oral employment contract extended more than one year ordinarily precluding breach of contract action, "the facts adduced at trial may show that in this particular case, there was sufficient reliance to estop the defendant from raising the Statute of Frauds as a defense."); *Clark v. Coats & Suits Unlimited*, 135 Mich.App. 87, 352 N.W.2d 349 (1984) ("Where factual issues exist which might remove the alleged agreement from the operation of the statute of frauds (*e.g.,* promissory estoppel or the doctrine of partial performance), it is improper to grant a motion brought pursuant to GCR 1963, 116.1(5). And, if a reviewing court determines that the lower court performed some factfinding in granting such a motion, the reviewing court will reverse.");[13] *Customized Transp., Inc. v. Bradford*, 114 F.3d 1186 (unpublished Sixth Cir. Mich. 1997) (Although the statute of frauds [contract to extend beyond one year] barred the contract action, "CTI may escape the reach of the Statute of Frauds by demonstrating that promissory estoppel applies to the settlement agreement.").

[13] *Clark's* reference to the lower court's improper "factfinding," is pertinent. Here, *de facto*, the trial court determined that no facts could lead to plaintiff properly bringing the promissory estoppel action – a manifestly indefensible conclusion.

In sum, Michigan decisional authority is clear and persuasive. The statute of frauds does not bar promissory estoppel, where the equities so demand. Here, full development of the record will demonstrate Defendant promised to protect Plaintiff and pay a commission, but instead, Defendant stole Plaintiff's work in procuring a buyer.

In a different context, *Crest the Uniform Co., Inc. v. Foley*, 806 F.Supp. 164 (U.S.D.C. E.D. 1992), addressed an individual's oral promise to pay the debt of a corporation, a promise within the statute of frauds. *Id.*, 168-169. The court held that the promise was enforceable as a promissory estoppel claim. *Id.*

> As to * * * Foley's alleged promise subject to the statute of frauds, plaintiff claims that, under the doctrine of promissory estoppel, defendant Foley may be held liable on his oral promise to pay the past debts of his corporations notwithstanding the statute of frauds. Application of the doctrine of promissory estoppel is based on the particular factual circumstances of a case and, as an equitable remedy, is employed to alleviate an injustice resulting from strict adherence to established legal principles, such as those underlying the statute of frauds. *Hebrew Teachers v. Jewish Welfare*, 62 Mich.App. 54, 60, 233 N.W.2d 184 (1975).
>
> Thus, promissory estoppel, if established, can be invoked to defeat the defense of the statute of frauds. *Lovely v. Dierkes*, 132 Mich.App. 485, 489, 347 N.W.2d 752 (1984); *McMath v. Ford Motor Co.*, 77 Mich.App. 721, 725, 259 N.W.2d 140 (1977).

In *Crest*, the importance of factual development was clear, and the trial court denied the motion for summary judgment. Here, the trial court necessarily assumed that promissory estoppel could be established but ruled the statute of frauds – regardless of facts that might be developed through discovery or at trial – precluded Plaintiff's action. The trial court erred. The Court of Appeals perceived the trial court's error. The Court of Appeals properly reversed the trial court, relying upon this Court's decision in *Opdyke, supra*. Accord *Continental Identification Products, Inc. v. EnterMarket, Corp.*, unpublished

2008 WL 51610 (U.S.D.C. W.D. 2008) (although the statute of frauds putatively barred the contract requiring a party to pay the debt of another, part performance may satisfy the statute; alternatively, a claim for promissory estoppel is not barred).

In yet another context, *Nygard v. Nygard*, 156 Mich.App. 94, 401 N.W.2d 323 (1986), involved a man's promise to care for the woman's children in exchange for marriage. Upon divorce, the wife sued for support and maintenance of the children. As there was no writing, the putative contract could not be enforced *qua* contract. *Id.* at 99, fn. 2 at 99.[14] Notwithstanding MCL 566.132(1), equitable considerations permitted the action.

> In addition, we believe that traditional notions of estoppel may provide a basis for plaintiff's requested relief. The facts of this case suggest either that plaintiff and defendant entered into an enforceable contract whereby defendant agreed to support the child, or, if the statute of frauds prevents the contract from being enforceable, that defendant may be held responsible under the doctrine of "equitable estoppel" or "promissory estoppel."
>
> In *Pursell v. Wolverine-Pentronix, Inc.*, 44 Mich.App. 416, 418–419, 205 N.W.2d 504 (1973), this Court indicated, referring to 3 Williston, Contracts (3d ed.), § 533A, P 796, regarding the doctrine of equitable estoppel, that where "one has acted to his detriment solely in reliance on an oral agreement, an estoppel may be raised to defeat the defense of the Statute of Frauds." This Court also indicated that the doctrine of equitable estoppel applies in those cases where its application is called for by the facts. 44 Mich.App. 420, 205 N.W.2d 504.
>
> * * * The circumstances of this case are such that the promise must be enforced if injustice is to be avoided. Because of defendant's promise an obligation arose both to plaintiff and to the child. We believe that this promise can be enforced by the circuit court in this divorce proceeding. [*Id.* at 99-100.]

Patently, Michigan law permits an action for promissory estoppel under circumstances where a contract action is barred by the statute of frauds. (Alternatively stated, there is a unilateral contract; equity estops Defendant from raising the statute of frauds.)

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[14] The court opined, "The facts of this case suggest * * * if the statute of frauds prevents the contract from being enforceable, that defendant may be held responsible under the doctrine of 'equitable estoppel' or 'promissory estoppel.'"

And, as noted, cases decided under MCL 566.132(2) (regarding financial institutions) should be disregarded. There is a distinction between the language used in subsection (2)(1) and subsection (2)(2). See, e.g., *Crown Technology Park v. D&N Bank, FSB*, 242 Mich.App. 538, 549, 619 N.W.2d 66 (2000), noting the amendment to MCL 566.132: "In 1992, the Legislature responded to an apparent problem in the banking industry by amending the statute of frauds, M.C.L. § 566.132; MSA 26.922, with 1992 PA 245, effective January 1993."

Three decisions relied on by Defendant are discussed.

In *Ekelman v Freeman*, 350 Mich. 665, 87 N.W.2d 157 (1957), the Court rejected a claim for a broker commission allegedly predicated on a verbal agreement. This Court opined, "The legislative purpose was to protect the owners of real estate against unfounded claims based on alleged oral agreements for the payment of commissions for services in procuring sales." *Id.* at 667. Manifestly, the legislative purpose is not served by the trial court's ruling. Rather, the trial court's decision encourages a seller to erect a sign explicitly promising that it will pay a broker commission and then to repudiate its promise after it has garnered the benefit of the broker's work.

Similarly, S*mith v Starke*, 196 Mich. 311, 162 NW 998(1917), simply does not address the issue of first impression raised by this cause of action. The plaintiff asserted a claim; "[t]he entire transaction rested in parol." *Id.* at 313. But the oral agreement is ephemeral, whereas here, the sign is tangible. One could hit another on the head with the sign to exhibit its solidity. An alleged oral agreement is susceptible to debate over who said what and when it was said. The sign is unequivocal. The words on the sign are meaningful –

not to be disregarded whenever inconvenient to the seller/writer. So for the reasons set forth by the New Jersey Supreme Court, Defendant is estopped from raising the statute of frauds in its defense.

Defendant also relies on *Mead v Rehm*, 256 Mich. 488, 239 N.W. 858 (1932), but that decision, too, differs. (George Rehm testified that "he was verbally authorized by John Rehm to list the property with plaintiff." "Defendants John and Grace Rehm denied authorizing George Rehm to make the agreement sued upon." "A verbal agreement to pay the commission is * * * void.") Again, Defendant's citation to authority provides no guidance in this case of first impression.

It would serve no purpose to review and distinguish case after case. Clearly, this Court is called upon to resolve a case of first impression, and appellate review should await a full development of the record.

Michigan law recognizes that a party may be equitably estopped from raising a defense. And as noted by *National Newark & Essex Bank*, the policy of the statute of frauds is "not offended" by the decision to award a broker's commission. Rather, "[t]he offer invited acceptance by performance." *Id.* at 505. Plaintiff respectfully maintains this Court should reverse the trial court's order of summary disposition.

CONCLUSION AND RELIEF REQUESTED

It can hardly be doubted that Defendant has unfairly and unjustly treated Plaintiff. On precisely these circumstances, equity steps in. Defendant is equitably estopped from asserting the statute of frauds under the circumstances of this case. These facts call up the *Heaton* admonition. For Defendant to "avail [itself]" and "yet refuse to pay the broker

anything" would be a gross injustice. The trial court reversibly erred by entering its order of summary disposition in Defendant's favor, in contravention of Michigan law; the Court of Appeals properly achieved the proper outcome by reversing.

WHEREFORE, Plaintiffs-Appellants, NORTH AMERICAN BROKERS, LLC, and MARK RATLIFF by their attorneys Richard E. Shaw and Jamal John Hamood, pray this Honorable Court deny Defendant-Appellant's application for leave to appeal.

Respectfully submitted,

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May 3, 2017